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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

NATIONAL BANK OF ARIZONA, N.A.,

Petitioner,

v.

HON. KENNETH LEE, Judge of the Superior Court of the State of Arizona, in and for the County of Pima,

Respondent,

and

ROBERT T. LAMB,

Real Party in Interest.

2 CA-CV 2009-0158
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. C20093233

APPEAL DISMISSED;
SPECIAL ACTION JURISDICTION ACCEPTED;
RELIEF GRANTED IN PART

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V Á S Q U E Z, Judge.

¶1 In this deficiency action, National Bank of Arizona (NBA) appeals from the trial court's order dismissing its claim against Robert Lamb and referring the matter to arbitration. NBA argues the court should have stayed the proceedings pending arbitration. NBA additionally contends that the deficiency action was exempt from the parties' arbitration agreement and that, in any event, Lamb waived his right to arbitrate. For the reasons set forth below, we dismiss NBA's appeal for lack of appellate jurisdiction. However, in our discretion, we have elected to treat the appeal as a special action and accept special action jurisdiction. We affirm the court's order compelling arbitration but vacate the entry of dismissal and direct the court to enter an order staying the court proceedings.

I. Facts and Procedural Background

¶2 The relevant facts are undisputed. In March 2006, NBA made a loan to Lamb of $403,650, which was secured by a deed of trust on a parcel of real property. Lamb defaulted on the loan, and NBA exercised its power to sell the encumbered property according to the deed of trust. A trustee's sale was conducted on February 2, 2009, at which time $428,351.43, including interest, was due on the note. The property was sold for $304,000, leaving a deficiency of $124,351.43.

¶3 On April 28, 2009, NBA filed a complaint in superior court alleging breach of contract and seeking judgment for the unpaid balance of the loan. In June, Lamb

successfully moved to dismiss the complaint. The court then referred the matter to arbitration "pursuant to the contract," and NBA filed a notice of appeal.

II. Jurisdiction

¶4 In moving to dismiss the complaint, Lamb argued that the deed of trust contained a mandatory arbitration clause and that NBA had failed to initiate arbitration within ninety days after the trustee's sale as required under the deficiency statute, A.R.S. § 33-814(A). Without explanation, the trial court granted Lamb's motion to dismiss and referred the case to arbitration. When a trial court grants a motion without specifying its reasons for doing so, we presume its ruling was based on one or more of the grounds asserted by the moving party. *Brown v. Superior Court*, 137 Ariz. 327, 331, 670 P.2d 725, 729 (1983).

¶5 Here, granting Lamb's motion to dismiss on the grounds raised effectively disposed of the case in its entirety, so there should have been nothing left for the trial court to refer to arbitration. However, if the court instead intended to refer the matter to arbitration because it concluded arbitration was the proper forum, then it was required by A.R.S. § 12-1502 to stay the court proceedings. The statute does not authorize dismissal of a cause of action pending arbitration. Consequently, the court's order appears internally contradictory.

¶6 This contradiction is significant because it directly affects the issue of this court's jurisdiction over NBA's appeal. Because "the right to appeal exists only by force of statute," *Cordova v. City of Tucson*, 15 Ariz. App. 469, 470, 489 P.2d 727, 728 (1971), "[w]e are obligated to examine our jurisdiction over an appeal," *Grand v. Nacchio*, 214

Ariz. 9, ¶ 12, 147 P.3d 763, 769 (App. 2006). If the trial court's order can be characterized as granting a motion to dismiss, we have appellate jurisdiction. *See* A.R.S. § 12-2101(B); Ariz. R. Civ. P. 41(b) (unless court specifies otherwise, involuntary dismissal constitutes "adjudication upon the merits"); *Sanchez v. Old Pueblo Anesthesia, P.C.*, 218 Ariz. 317, n.1, 183 P.3d 1285, 1287 n.1 (App. 2008).

¶7 In contrast, orders compelling arbitration are interlocutory and unappealable in the absence of inclusion in the order of language consistent with Rule 54(b), Ariz. R. Civ. P., or some other affirmative indication by the trial court that it intended the order to be final. *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶¶ 18, 20, 977 P.2d 769, 775 (1999); *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, ¶¶ 15-16, 161 P.3d 1253, 1258 (App. 2007); *W. Agric. Ins. Co. v. Chrysler Corp.*, 198 Ariz. 64, ¶¶ 8-9, 6 P.3d 768, 770 (App. 2000). Because neither party addressed the issue of our appellate jurisdiction, we ordered supplemental briefing. Both parties maintain we have jurisdiction because the trial court's order dismissed with prejudice all of the claims pending before it. They therefore assert the order was a final, appealable order that conferred appellate jurisdiction on this court. However, neither party has provided controlling authority to support the underlying premise of their argument—that, for jurisdictional purposes, this court is bound by a trial court's erroneous dismissal of claims referred to arbitration, despite the statute requiring it to stay, rather than dismiss, those claims.

¶8 We decline to find that the trial court's erroneous order contemporaneously granting dismissal makes the order appealable. As this court stated in *Ruesga*, "[t]o hold

that the trial court's final order is appealable based on [a] procedural anomaly . . . would defeat the legislature's intent in making orders compelling arbitration nonappealable." 215 Ariz. 589, ¶ 12, 161 P.3d at 1257. Although the court entered what, under other circumstances, would be an appealable order of dismissal, it simultaneously compelled the parties to arbitrate the very claims it dismissed. *See id.* ¶ 12 ("The substance or effect of an order determines its character for appeal purposes."). Substantively, the court's order is interlocutory, and this court thus lacks appellate jurisdiction in the absence of Rule 54(b) language. *Id.* ¶ 15.

¶9 For the first time at oral argument, Lamb argued the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, controls our interpretation of the parties' arbitration agreement and the application of federal law renders the trial court's order appealable. Indeed subsection 7(f) of the arbitration agreement states the FAA "shall apply to the construction and interpretation of this arbitration clause." NBA does not dispute Lamb's argument.

¶10 As with A.R.S. § 12-1502, under the FAA orders compelling arbitration are interlocutory and, therefore, unappealable. 9 U.S.C. § 16(a)(3); *Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 268 (3d Cir. 2004). But NBA contends the Supreme Court's opinion in *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79 (2000), "changed the law regarding this issue" and suggests we apply its reasoning here. In *Green Tree*, the Court "address[ed] whether an order compelling arbitration and dismissing a party's underlying claims is a 'final decision with respect to an arbitration' within the meaning of § 16(a)(3) of the [FAA], 9 U.S.C. § 16(a)(3), and is thus immediately appealable." 531 U.S. at 82.

Section 16(a)(3) of the FAA grants federal appellate jurisdiction of arbitration orders that are "final decision[s] with respect to an arbitration." The Court noted that "the term 'final decision' has a well-developed and longstanding meaning. It is a decision that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'" *Green Tree*, 531 U.S. at 86, *quoting Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Therefore, the Court concluded that an order dismissing all claims and compelling arbitration was final.

¶11 But here, our determination of state law issues is governed by Arizona statute, and we are not bound by *Green Tree*'s reasoning or holding. *See E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 206 Ariz. 399, ¶ 36, 79 P.3d 86, 97 (App. 2003) (Arizona courts not bound by United States Supreme Court's interpretation of analogous federal statutes). Notwithstanding the parties' agreement, there is no federal mandate that the FAA apply to their agreement. And although the parties may agree to be bound by the provisions of the FAA in the "construction and interpretation" of the agreement's arbitration clause, their choice of law does not govern this court's appellate jurisdiction. "Parties cannot, by agreement or consent, confer subject matter jurisdiction on a court where it would not otherwise exist." *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 21, 218 P.3d 1045, 1053 (App. 2009).

¶12 In its supplemental brief, NBA argues that, in the event this court lacks appellate jurisdiction, we "should treat the appeal as a special action" because it has no "'equally plain, speedy, and adequate remedy by appeal.'" Ariz. R. P. Spec. Actions 1(a). We agree. The issues raised here are substantial and primarily issues of law; the delay in

arbitration sought to be avoided by making such orders nonappealable has already occurred; and we see no reason, under the circumstances, that the parties should bear the time and expense of participating in arbitration if the trial court has compelled arbitration in error. *See Ruesga*, 215 Ariz. 589, ¶ 16, 161 P.3d at 1258 (assuming special action jurisdiction sua sponte because it "promote[d] judicial economy and efficient use of . . . parties' and . . . court's resources"); *S. Cal. Edison Co.*, 194 Ariz. 47, ¶ 20, 977 P.2d at 775 (special action jurisdiction appropriate to review claims of non-arbitrability that are not "frivolous or insubstantial"). Therefore, in our discretion, we accept special action jurisdiction and address the issues presented.

III. Discussion

¶13 NBA contends "the trial court erred when it ruled the . . . language of the arbitration clause mandated arbitration as [its] exclusive remedy." And it argues that, because Lamb did not file a motion to compel arbitration within forty-five days after service of the complaint pursuant to the agreement, he has waived his right to arbitration. In special action proceedings, we review the lower court's order to determine whether it was "arbitrary and capricious or an abuse of discretion." Ariz. R. P. Spec. Actions 3(c); *see also Purcell v. Superior Court*, 172 Ariz. 166, 169, 835 P.2d 498, 501 (App. 1992). And, because arbitration agreements are contractual in nature, their interpretation is a question of law that we review de novo. *See Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, ¶ 11, 87 P.3d 81, 83 (App. 2004).

¶14 In his motion to dismiss, Lamb argued the agreement contained a mandatory arbitration clause and NBA therefore could not seek a deficiency judgment

except through arbitration. And, because the ninety-day window for filing a deficiency action had passed without NBA's having filed a request to arbitrate, *see* A.R.S. § 33-814(A), Lamb contended he was entitled to outright dismissal of the complaint.

¶15 As we have noted, the trial court granted Lamb's motion to dismiss and compelled arbitration without elaboration. Considering the court's ruling in context, we infer that, by ordering arbitration, the court necessarily concluded the language in the arbitration clause was both mandatory and applicable to the deficiency action. The court's ruling also left undecided the timeliness issues raised by both parties. We consider all of these issues in turn.

A. Contract Language

¶16 Judicial review of an agreement to arbitrate is greatly limited. "[A]rbitration clauses are construed liberally and any doubts about whether a matter is subject to arbitration are resolved in favor of arbitration." *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 189, 877 P.2d 284, 288 (App. 1994). A trial court's pre-arbitration review is limited to determining whether an arbitration agreement exists and whether the controversy at issue is encompassed by that agreement. *See Foy v. Thorp*, 186 Ariz. 151, 154, 920 P.2d 31, 34 (App. 1996) (filing action in superior court gives trial court authority to determine if arbitration agreement exists and applies to dispute); *Cottonwood*, 179 Ariz. at 190, 877 P.2d at 289 (trial court's review limited to determination whether "arbitration agreement truly exists"). "'An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in light of the

circumstances in which it [wa]s made.'" *U.S. Insulation, Inc. v. Hilro Constr. Co., Inc.*, 146 Ariz. 250, 257, 705 P.2d 490, 497 (App. 1985), *quoting In re Pahlberg Petition*, 131 F.2d 968, 970 (2d Cir. 1942); *see also Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153, 854 P.2d 1134, 1139 (1993) ("When interpreting a contract, . . . it is fundamental that a court attempt to 'ascertain and give effect to the intention of the parties at the time the contract was made if at all possible.'"), *quoting Polk v. Koerner*, 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975).

¶17 The arbitration provisions at issue here provide, in pertinent part:

> 6. ARBITRATION WILL APPLY TO ALL DISPUTES BETWEEN THE PARTIES, NOT JUST THOSE CONCERNING THE AGREEMENT.
>
> 7. . . . .
>
> (a) Any claim or controversy ("Dispute") between or among the parties . . . , including, but not limited to, Disputes arising out of or relating to this agreement, this . . . arbitration clause . . . , or any related agreements or instruments . . . shall at the request of any party be resolved by binding arbitration in accordance with the applicable arbitration rules of the American Arbitration Association.
>
> . . . .
>
> (e) No provision of this arbitration clause, nor the exercise of any rights hereunder, shall limit the right of any party to: (1) judicially or non-judicially foreclose against any real or personal property collateral or other security; (2) exercise self-help remedies . . . ; or (3) obtain from a court having jurisdiction thereover any provisional or ancillary remedies[.] . . . The exercise of such rights shall not constitute a waiver of the right to submit any Dispute to arbitration, and any claim or controversy related to the exercise of such rights shall be a Dispute to be resolved under the provisions of this arbitration clause. Any party may initiate arbitration with the

> Administrator. If any party desires to arbitrate a Dispute asserted against such a party in a complaint, counterclaim, cross-claim, or third-party complaint thereto, or in an answer or other reply to any such pleading, such party must make an appropriate motion to the trial court seeking to compel arbitration, which motion must be filed with the court within 45 days of service of the pleading, or amendment thereto, setting forth such Dispute.

¶18 NBA and Lamb disagree on the meaning of this language. NBA contends arbitration is permissive, arguing "[t]he general provision, that any dispute will be resolved by binding arbitration, is modified by the specific language providing that a condition . . . must be met before arbitration is required: a party must request arbitration before he may require the other party to participate in arbitration." Lamb responds that NBA's interpretation "asks this Court to disregard all of the mandatory language in its Deed of Trust arbitration provisions and focus out of context on one phrase 'at the request of any party.'" Lamb instead relies on the language in Section 6, which he contends controls the agreement's meaning, and he asserts "[t]he phrase 'at the request of any party' does not make arbitration permissive or optional. This phrase merely states that either party can commence the mandatory arbitration process."

¶19 The arbitration clause in the deed of trust is not a model of clarity. Indeed, some of its terms seem facially contradictory: arbitration "will" apply to all disputes, yet the agreement provides a process apparently dependent upon the "request" of a party to initiate arbitration proceedings. And, although there are enumerated exceptions to the blanket arbitration requirement, any dispute related to these exceptions "shall be a dispute to be resolved" under the arbitration clause. Nonetheless, if possible, "[e]ach section . . .

must be read in relationship to each other to bring harmony . . . among all parts of the writing." *Provident Nat'l Assur. Co. v. Sbrocca,* 180 Ariz. 464, 465, 885 P.2d 152, 153 (App. 1994).

¶20 Section 6 provides that "arbitration will apply to all disputes." The use of the word "will," like "shall," "indicates a mandatory intent." *See Ins. Co. of N. Am. v. Superior Court*, 166 Ariz. 82, 85, 800 P.2d 585, 588 (1990). This clause is very explicit. It does not purport merely to apply the arbitration agreement to all disputes arising under the agreement. Rather, it requires arbitration of "all disputes between the parties, not just those concerning the agreement." This section therefore evinces the intent that all disputes will be resolved through arbitration.

¶21 Next, subsection 7(a) states that any dispute "shall at the request of any party be resolved by binding arbitration." This is the language at the crux of NBA's argument. It contends that "at the request of any party" entitles it to file a complaint related to any type of dispute in superior court and that the "request to arbitrate" is a condition precedent, without which the arbitration agreement does not apply. Relying on three cases to support this argument, NBA claims "the language and purpose [of its arbitration clause] is essentially the same as [that in] the . . . cited cases, [all] of which involve conditions precedent to arbitration." *See HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003); *Douglass v. Allstate Ins. Co.*, 953 P.2d 770, 771 (Or. App. 1998); *Lind v. Allstate Ins. Co.*, 902 P.2d 603, 604-05 (Or. App. 1995).

¶22 In *HIM Portland*, the court considered the meaning of a clause that provided "the parties 'shall endeavor' to resolve their disputes by mediation" before

pursuing arbitration. 317 F.3d at 44. HIM argued this language had been included in the contract to encourage mediation but not to require it. The court rejected this interpretation because other clauses in the contract "state[d] in the plainest possible language that mediation [wa]s a condition precedent to arbitration." *Id.* Indeed, one clause stated, "Claims, disputes, and other matters in question arising out of or relating to this Contract . . . shall . . . be subject to mediation as a condition precedent to arbitration . . . ." *Id.*

¶23 And, in *Lind*, the court considered an uninsured-motorist insurance contract that provided: "If the person insured or [the insurance company] don't agree on that person's right to receive any damages or the amount, then upon the written request of either, the disagreement will be settled by arbitration." 902 P.2d at 604-05. Interpreting this language, the court stated that "neither the insured nor the insurer is *required* to arbitrate before pursuing litigation. Rather, the obligation to arbitrate arises only if one party makes a written demand for arbitration." *Id*. at 605. This holding was later recognized in *Douglass*, 953 P.2d at 771 n.1, the third case on which NBA relies.[1]

¶24 NBA argues "[t]hese cases stand for the proposition that where there is some event or action required by the contract before arbitration is triggered, the event or action must take place before arbitration is mandated." But this principle is not in dispute, and it begs the very question under consideration—whether the arbitration

[1]The only language NBA cites from *Douglass* comes from this footnote and is a direct quote from the court's opinion in *Lind*. *See* 953 P.2d at 771 n.1. The remainder of *Douglass* is irrelevant to the issues presented in this case. We thus do not discuss it further.

agreement in this case sets forth a condition precedent to compulsory arbitration. And, under the circumstances here, none of the cases cited assists us in resolving this issue. In *HIM Portland* and *Lind*, the court found the language that created each of the conditions precedent was unambiguous on its face, and an interpretation that the condition precedent existed did not create a conflict with any of the other language in the contract. *HIM Portland*, 317 F.3d at 44; *Lind*, 902 P.2d at 604-05. That is simply not the case here.

¶25 As NBA tacitly recognizes, interpreting the arbitration clause to mean that all disputes may be resolved through litigation in the absence of a request to arbitrate creates at least some conflict with the broad statement in Section 6 that arbitration applies to all disputes between the parties. To reconcile this conflict, NBA contends "[t]he general provision, that any dispute will be resolved by binding arbitration, is modified by the specific language providing that a condition must be met before arbitration is required: a party must request arbitration . . . ." But this interpretation goes beyond merely using the more specific language in subsection 7(e) to clarify or explain the general language of Section 6. It uses the more specific statement to change the general statement's meaning. Section 6 states that "arbitration will apply to all disputes." NBA's interpretation would make this section permissive rather than mandatory, thus altering it to mean arbitration would apply only to those disputes in which it is specifically requested under subsection 7(e). The arbitration clause, read as a whole, cannot support this interpretation. Instead, both sections can be harmonized so that neither is rendered ineffectual.

¶26 Courts must construe contracts "'so that every part is given effect, and each section of an agreement must be read in relation to each other to bring harmony, if possible, between all parts of the writing.' Our reading of one provision of a contract must not render a related provision meaningless." *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, ¶ 45, 224 P.3d 960, 973 (App. 2010), *quoting Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993); *see also Tenet Healthsystem TGH, Inc. v. Silver*, 203 Ariz. 217, ¶ 11, 52 P.3d 786, 790 (App. 2002) ("fundamental rule[] of contract interpretation" that court construe contract so that effect given to all parts).

¶27 Subsection 7(e) further provides that the agreement may not be interpreted to limit the rights of the parties to seek foreclosure, self-help remedies, or to obtain from a court provisional or ancillary remedies and that such rights may be exercised at any time. But it also provides that any dispute related to the exercise of these rights is a dispute "to be resolved under the provisions of the arbitration clause." This same subsection later provides that, upon the initiation of court proceedings against a party, the party may compel arbitration by filing a motion to compel within forty-five days of service of the complaint. Contrary to NBA's argument, this procedure applies to only those disputes excepted from the broad reach of Section 6.

¶28 The requirement that the party wishing to initiate arbitration must file a motion to compel within forty-five days of service of the complaint or other court action exists only in subsection 7(e). That subsection is the only provision expressly authorizing the initiation of court proceedings under any circumstances, and the circumstances listed

are explicit exceptions to the general rule requiring arbitration. As the drafter of the document, NBA created numerous sections and subsections in its arbitration agreement, each of which discusses a particular, singular topic. Had NBA broadly intended to permit a party to initiate all claims by filing a legal action and thus intended to mandate arbitration only when the defendant requests it, it could have stated so explicitly. Thus, the procedure for initiating arbitration found in subsection 7(e) must apply only to those court proceedings authorized under that subsection.

¶29 Therefore, considering the arbitration agreement as a whole, we conclude it requires arbitration of all disputes not specifically excepted in subsection 7(e). Disputes arising under subsection 7(e) may be initiated in court but are subject to arbitration upon the non-filing party's compliance with the procedure set forth in that subsection.

B. Deficiency Action

¶30 Because the arbitration agreement provides both mandatory and permissive arbitration procedures, depending upon the type of claim asserted, we next must determine which procedure applies to NBA's deficiency action. In its opening brief, NBA argues that, because a deficiency action "is a purely statutory remedy ancillary to foreclosure," it is excepted from arbitration under subsection 7(e) of the agreement. But NBA did not make this argument below, and generally arguments not presented to the trial court are deemed waived. *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶¶ 22-23, 160 P.3d 223, 229-30 (App. 2007). Citing *In re MH 2007-001275*, 219 Ariz. 216, 196 P.3d 819 (App. 2008), and *Evenstad v. State*, 178 Ariz. 578, 582, 875 P.2d 811, 815 (App. 1993), NBA nonetheless asks this court to consider its unpreserved argument

because we should not "be limited to the arguments made by the parties if that would cause [the court] to reach an incorrect result." *Evenstad*, 178 Ariz. at 582, 875 P.2d at 815.

¶31 That principle has great force when the court is considering constitutional issues of due process, *MH 2007-001275*, 219 Ariz. 216, ¶¶ 10-11, 196 P.3d at 822, or the meaning of a statute, *Evenstad*, 178 Ariz. 578 at 582, 875 P.2d at 815, because, in such cases, the court's holding will affect the rights of individuals well beyond those before it in a particular case. Here, however, we are interpreting a contract between two private parties, and this court's adherence to the general rule of waiver will not affect the ability of other parties to assert a similar claim in the future. We therefore find no "extraordinary circumstances" warranting consideration of this argument despite NBA's failure to preserve it, and we do not address it further. *See Harris*, 215 Ariz. 344, ¶¶ 22-23, 160 P.3d at 229-30.[2]

C. Timeliness and Waiver of Right to Arbitrate

¶32 NBA contends it was improper for the trial court to compel arbitration because Lamb's motion to dismiss on the ground arbitration was mandatory was

[2]In any event, at oral argument, NBA appeared to concede the deficiency action was subject to the arbitration agreement, when its counsel stated:

> My client would be willing to arbitrate, all that we asked for was to have it properly requested. My client knows there's an arbitration provision in the document. Either party can repudiate the right to arbitrate, and that's what we did when we filed the complaint. But if they wanted to, all they had to do was file a motion to compel.

insufficient to qualify as a request for arbitration. NBA asserts Lamb therefore has waived his right to arbitrate because he did not move to compel arbitration within forty-five days after service of the complaint or, in the alternative, because the motion to dismiss was so antithetical to the invocation of arbitration as to constitute a waiver of his right to enforce the arbitration agreement. However, "whether a procedural condition [such as a request for arbitration or the filing of a motion to compel] has been met does not call into question the existence of the [arbitration] agreement but, instead, affects how that agreement will be interpreted." *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 190, 877 P.2d 284, 289 (App. 1994). Thus, "short of repudiation, th[e] decision regarding the failure of a procedural condition is for the arbitrator and not the court to make." *Id*. at 193, 877 P.2d at 292.

¶33 "Repudiation is a voluntary relinquishment of a known right that usually entails prejudice to the other party." *Id.* at 190, 877 P.2d at 289. A voluntary relinquishment may be inferred when the party seeking arbitration has engaged in conduct inconsistent with preserving the right to arbitrate, such as "preventing arbitration, making arbitration impossible, proceeding at all times in disregard of the arbitration clause, expressly agreeing to waive arbitration, or unreasonable delay." *EFC Dev. Corp. v. F. F. Baugh Plumbing & Heating, Inc.*, 24 Ariz. App. 566, 569, 540 P.2d 185, 188 (1975). Under the circumstances here, where Lamb did not initiate the proceedings in superior court, did not participate in litigation beyond seeking dismissal for failure to state a claim, and at the first opportunity filed a motion that unequivocally argued the mandatory arbitration clause applied to the claim being asserted, we cannot say his

actions constituted repudiation. Consequently, any remaining issues concerning timeliness, the nature and extent of any conditions precedent, and whether such conditions were met are matters for the arbitrator to determine. *See City of Cottonwood*, 179 Ariz. at 193, 877 P.2d at 292.

D. Order Dismissing Case

¶34 As it did below, NBA argues here that, if arbitration was compelled properly, pursuant to § 12-1502(D) "the trial court should have stayed the litigation pending arbitration rather than dismiss the case."[3] It is undisputed that the trial court did not apply the plain wording of § 12-1502(D) when it both dismissed NBA's complaint and ordered arbitration. Section 12-1502(D) provides:

> Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

Section 12-1502(D) applies to "[a]ny action or proceeding involving an issue subject to arbitration" and mandates a stay "if an order for arbitration . . . has been made." Here, the trial court determined that the issues involved were subject to arbitration and that, pursuant to the contract, the parties could proceed only through the agreed-upon arbitration process. The court therefore was required by statute to stay the action in order

[3]Although, as we have stated, the FAA governs the parties' arbitration agreement, "the United States Supreme Court has held that states may regulate arbitration clauses" and nothing in § 12-1502(D) "'would place arbitration clauses on an unequal "footing" directly contrary to the [FAA]'s language and Congress' intent.'" *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, ¶ 9, 119 P.3d 1044, 1048 (App. 2005), *quoting Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

to effect its arbitration order, and it erred in granting the motion to dismiss NBA's complaint.[4] We thus vacate that portion of the court's order.

IV. Disposition

¶35 For the reasons stated above, we dismiss NBA's appeal for lack of jurisdiction and accept special action jurisdiction. We affirm the trial court's order compelling arbitration but vacate its entry of dismissal. We remand to the trial court for the limited purpose of entering an order staying this action pending arbitration proceedings. In our discretion, we deny both parties' requests for attorney fees. *See Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 164, 876 P.2d 1190, 1199 (App. 1994) (award of appellate attorney fees in contract action discretionary).

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

[4]Because we have concluded the trial court lacked the authority to dismiss NBA's complaint once it compelled arbitration, we need not consider NBA's argument that, because A.R.S. § 33-814 requires the filing of a lawsuit within ninety days of a trustee's sale, a dismissal of its complaint would "completely rob[it] of its claim for a deficiency."